STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 5, 2014
v	No. 312583 Kent Circuit Court
ANTONIO MARKESE CUMMINGS, Defendant-Appellant.	LC No. 12-002310-FC

Before: METER, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his convictions by a jury of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under 13 years of age), and impersonating a public officer, MCL 750.215. The trial court sentenced him as a third-offense habitual offender, MCL 769.11, to consecutive terms of 30 to 60 years' imprisonment for the CSC offenses and to 156 days of time served for the remaining conviction. We affirm.

The prosecution alleged that defendant sexually abused his stepdaughter, S, and biological daughter, T. At trial, S testified that defendant put his penis in her mouth on three separate occasions. T testified that defendant put his penis in her mouth on one occasion. Both S and T testified that in each instance, defendant instructed them to close their eyes and open their mouths. The testimony supports that S and T were no older than eight and four years old, respectively, at the times defendant sexually abused them.

Defendant first argues that there was insufficient evidence to support his two CSC I convictions. We disagree. "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "[W]hen reviewing claims of insufficient evidence, this Court must make all reasonable inferences and resolve all credibility conflicts in favor of the jury verdict." *People v Solmonson*, 261 Mich App 657, 661; 683 NW2d 761 (2004).

The victims' testimony established the necessary elements of defendant's CSC I convictions. Defendant argues, however, that the prosecution's evidence was not sufficiently credible. "It is a well established rule that a jury may convict on the uncorroborated evidence of

a CSC victim . . . ." *People v Lemmon*, 456 Mich 625, 642 n 22; 576 NW2d 129 (1998); see also MCL 750.520h. "Questions of credibility are left to the trier of fact and will not be resolved anew by this Court." *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Accordingly, we find that the prosecution presented sufficient evidence to support defendant's CSC I convictions.

Defendant next argues that the trial court erred by denying his motion for a hearing and a new trial on the basis that trial counsel was ineffective.

> We review for an abuse of discretion a trial court's decision to grant or deny a new trial. An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes. Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. [*People v Russell*, 297 Mich App 707, 715; 825 NW2d 623 (2012) (citations and internal quotation marks omitted).]

"A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008).

> A defendant must meet two requirements to warrant a new trial because of the ineffective assistance of trial counsel. First, the defendant must show that counsel's performance fell below an objective standard of reasonableness. In doing so, the defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy. Second, the defendant must show that, but for counsel's deficient performance, a different result would have been reasonably probable. [*People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011) (citations omitted).]

Defendant argues, as he did in his motion for a new trial, that his trial counsel was ineffective for failing to call certain witnesses that defendant requested to appear and failing to obtain an expert witness in the area of child witnesses. "[D]efendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel[.]" *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Nothing in the record before us supports defendant's contentions that he provided his trial counsel with potential witnesses and that counsel failed to contact any of them or that counsel failed to investigate the possibility of calling an expert witness at trial. Defendant did not attach any affidavits to his motion or present any other supporting evidence, and he does not do so on appeal. On the record before us, it is unclear what efforts trial counsel took to investigate and procure potential witnesses for trial, and it is unclear whether defendant's proposed witnesses would have provided favorable testimony. Moreover, "[a]n attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy," *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009), and "the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense," *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Defendant has not shown that trial counsel's decisions regarding what witnesses to call was not reasonable trial strategy or that counsel's failure to call certain witnesses deprived him of a substantial defense. The trial court did not abuse its discretion by denying defendant's

motion for a new trial and by rejecting the related requests for an evidentiary hearing and a private investigator.

Defendant also argues that the trial court erred by imposing consecutive sentences for his CSC I convictions. Our review of defendant's unpreserved claim of sentencing error is limited to ascertaining whether a plain error occurred that affected defendant's substantial rights. See *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004); see also *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"In Michigan, concurrent sentencing is the norm, and a consecutive sentence may be imposed only if specifically authorized by statute." *People v Ryan*, 295 Mich App 388, 401; 819 NW2d 55 (2012) (citation and internal quotation marks omitted). MCL 750.520b(3) provides that "[t]he court may order a term of imprisonment imposed under this section to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction." "A crime such as CSC-1 can be committed in myriad ways and give rise to multiple counts arising from the same transaction, leading to sentences on each count." *Ryan*, 295 Mich App at 405. "A fair import of the language in MCL 750.520b(3) is that the trial court ha[s] the discretion to impose" consecutive sentences for multiple counts of CSC I that arise from the same transaction. *Id*. at 406. "The term 'same transaction' is not statutorily defined; however, it has developed a unique legal meaning." *Id*. at 402. "Two or more separate criminal offenses can occur within the 'same transaction.'" *Id*. When determining whether the criminal offenses arose from the same transaction under MCL 750.520b(3), the court should consider whether the offenses "grew out of a continuous time sequence" and whether they "sprang one from the other and had a connective relationship that was more than incidental." *Ryan*, 295 Mich App at 403. "The purpose of consecutive-sentencing statutes is to deter persons from committing multiple crimes by removing the security of concurrent sentencing." *Id*. at 408. "[T]his Court has held: The consecutive sentencing statutes should be construed liberally in order to achieve the deterrent effect intended by the Legislature." *People v Williams*, 294 Mich App 461, 474; 811 NW2d 88 (2011) (citations and internal quotation marks omitted).

The record supports that defendant's act of CSC against T occurred on the same day as one of his acts of CSC against S. S testified that she was in the basement of the family home, waiting for the school bus to arrive, when defendant approached her and instructed her to close her eyes and open her mouth. According to S, defendant engaged in fellatio with her until she told him to stop. S then went to school. T testified that sometime after S left for school, defendant approached her and instructed her to close her eyes and open her mouth. Defendant then engaged in fellatio with T. The foregoing testimony supported an inference that defendant's fellatio with T "grew out of a continuous time sequence" and "had a connective relationship that was more than incidental" to his fellatio with S. *Ryan*, 295 Mich App at 403. Given that consecutive-sentencing statutes should be construed liberally, *Williams*, 294 Mich App at 474,

defendant has not shown that his consecutive sentences constitute plain error affecting his substantial rights. *Carines*, 460 Mich at 763.[1]

Defendant also contends that the trial court, even if authorized to impose consecutive sentences, abused its discretion by doing so in this case. "MCL 750.520b(3) does not mandate consecutive sentencing. Rather, it provides that a court 'may' impose consecutive sentences, making the decision discretionary." *Ryan*, 295 Mich App at 401 n 8. We have held that a "defendant's rape of his own minor child represents one of the most egregious forms of the crime of first-degree criminal sexual conduct because of the helplessness and harm to the victim when so abused by a parent," and "it represents an act that has been historically viewed by society and this Court as one of the worst types of sexual assault." *People v Sabin (On Second Remand)*, 242 Mich App 656, 662-663; 620 NW2d 19 (2000). At the sentencing hearing in this case, the trial court explained that it was imposing consecutive sentences "for the protection of small children as well as society." The jury found that defendant sexually penetrated his stepdaughter and daughter when they were no older than the ages of eight and four, respectively. Given that defendant's conduct "represents one of the most egregious forms of" CSC I and "it represents an act that has been historically viewed by society and this Court as one of the worst types of sexual assault," *Sabin (On Second Remand)*, 242 Mich App at 662-663, the trial court's imposition of consecutive sentences pursuant to MCL 750.520b(3) did not constitute plain error affecting defendant's substantial rights, *Carines*, 460 Mich at 763.

Defendant next argues that the trial court erred in scoring certain offense variables (OVs). We disagree. "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *People v McDade*, 301 Mich App 343, 356; 836 NW2d 266 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is

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[1] In response to the dissent, we set forth the following information from the transcript: (1) the mother testified that S told her on February 1 about acts of fellatio; (2) S testified that defendant sexually abused her before school, "and then when [she, S] came home" from school, T told her that defendant had sexually abused her (T); (3) T testified that defendant sexually abused her while S was at school and she told S about defendant's having sexually abused her "[w]hen she [S] came home" (T also testified, in response to a long question by the prosecutor, that she told S about the fellatio "a long time" after it happened, but it must be kept in mind that this was a *4-year-old girl* testifying—when T's entire testimony is read in context, it is clear that she was abused by defendant and told S about it that same day when S returned from school); (4) S answered "[y]eah" when asked, "what happened was [T] told you about what happened, and then you went and told your mom about what happened to both of you?

The evidence adequately supports a finding that the pertinent acts occurred on the same day, especially given that we are to use a plain-error standard of review for this issue. See *Carines*, 460 Mich at 763 (defining a "plain" error as a "clear or obvious" error). We can find no plain error on this record.

a question of statutory interpretation, which an appellate court reviews de novo." *Hardy*, 494 Mich at 438.

Contrary to defendant's argument, "[a] trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence." *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). Accordingly, "the standard of proof applicable to the guidelines scoring process differs from the reasonable doubt standard underlying conviction of an offense." *Id*. "The sentencing court makes its own findings of fact by a preponderance of the evidence. These findings are separate and distinct from the findings establishing the elements of the crime, which must be proved to a jury beyond a reasonable doubt." *People v McCuller*, 479 Mich 672, 720; 739 NW2d 563 (2007). See also *People v Drohan*, 475 Mich 140, 159-164; 715 NW2d 778 (2006), and *People v Herron*, 303 Mich App 392, 539-540; 845 NW2d 533 (2013), appeal held in abeyance ___ Mich ___; 846 NW2d 924 (2014).

Defendant challenges the trial court's scoring of OVs 4, 10, 13, and 19. The trial court assessed ten points for OV 4. "[A] sentencing court must assess 10 points under OV 4 if the victim sustained serious psychological injury that may require professional treatment, although treatment need not actually have been sought in order for these points to be assessed." *People v Ericksen*, 288 Mich App 192, 202-203; 793 NW2d 120 (2010). Defendant's presentence investigation report indicated that S and T had been receiving counseling and they "continue to participate in mental health counseling to address the harm caused by the defendant's criminal acts." The victims' mother also stated at the sentencing hearing that the victims were receiving counseling. Contrary to defendant's assertion, OV 4 does not require a professional diagnosis for the assessment of ten points. Moreover, "[a] presentence report is presumed to be accurate and may be relied on by the trial court unless effectively challenged by the defendant." *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). Defendant makes no effective challenge here. We find no error in the scoring of OV 4.

"OV 10 deals with the exploitation of vulnerable victims." *People v Jamison*, 292 Mich App 440, 444; 807 NW2d 427 (2011). "Pursuant to MCL 777.40(1)(b), a trial court may assess 10 points for OV 10 if '[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status[.]'" *People v Brantley*, 296 Mich App 546, 554; 823 NW2d 290 (2012). "In the context of OV 10, this Court has recently defined a 'domestic relationship' as 'a familial or cohabitating relationship . . . .'" *Brantley*, 296 Mich App at 554, quoting *Jamison*, 292 Mich App at 447. S and T were in "a familial or cohabitating relationship" with defendant at the time of the offenses. Moreover, S and T were no older than eight and four years old, respectively, at the time of the offenses. Thus, we conclude that the trial court did not err by finding that defendant "exploited a victim's . . . youth or agedness, or a domestic relationship, or the offender abused his or her authority status[.]'" *Brantley*, 296 Mich App at 554. The trial court did not err by assessing ten points for OV 10. *Id*.

"'Offense variable 13 is continuing pattern of criminal behavior.'" *People v Gibbs*, 299 Mich App 473, 487; 830 NW2d 821 (2013), quoting MCL 777.43(1). OV 13 directs the trial court to assess 50 points if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age[.]"

MCL 777.43(1)(a). "In scoring OV 13, 'all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.'" *People v Nix*, 301 Mich App 195, 205; 836 NW2d 224 (2013), quoting MCL 777.43(2)(a). A trial court may consider multiple convictions arising from the same incident. *Gibbs*, 299 Mich App at 487-488. S testified that defendant engaged in fellatio, i.e., sexual penetration, with her on three separate occasions. T testified that defendant engaged in fellatio with her on one occasion. The record supports that all four of these sexual penetrations occurred within a five-year period of defendant's sentencing offenses. *Nix*, 301 Mich App at 205; MCL 777.43(2)(a). Moreover, the trial court properly included defendant's sentencing offenses in its calculations. *Nix*, 301 Mich App at 205; MCL 777.43(2)(a). The trial court did not err by assessing 50 points under OV 13.

"With regard to OV 19, MCL 777.49(c) requires that the sentencing court assess 10 points if '[t]he offender otherwise interfered with or attempted to interfere with the administration of justice[.]'" *Ericksen*, 288 Mich App at 203. "The phrase 'interfered with or attempted to interfere with the administration of justice' is broad. . . . It includes acts constituting obstruction of justice, but is not limited to those acts." *People v Steele*, 283 Mich App 472, 492; 769 NW2d 256 (2009). Additionally, "the phrase 'interfered with or attempted to interfere with the administration of justice' encompasses more than just the actual judicial process. Law enforcement officers are an integral component in the administration of justice, regardless of whether they are operating directly pursuant to a court order." *People v Barbee*, 470 Mich 283, 287-288; 681 NW2d 348 (2004). Moreover, "because the circumstances described in OV 19 expressly include events occurring after the completion of the sentencing offense, scoring OV 19 necessarily is not limited to consideration of the sentencing offense." *People v Ray Smith*, 488 Mich 193, 195; 793 NW2d 666 (2010). The Michigan Supreme Court has made it "clear that interfering with a police officer's attempt to investigate a crime constitutes interference with the administration of justice." *People v Passage*, 277 Mich App 175, 180; 743 NW2d 746 (2007). Additionally, OV 19 applies even where the sentencing offense inherently involves interference with the administration of justice. *People v Underwood*, 278 Mich App 334, 339-340; 750 NW2d 612 (2008).

The record establishes that during the police investigation, defendant contacted a Department of Human Services employee and impersonated a police sergeant in an effort to learn the victims' whereabouts. Given that "[t]he phrase 'interfered with or attempted to interfere with the administration of justice' is broad," *Steele*, 283 Mich App at 492, we conclude that the trial court's decision to assess ten points under OV 19 was not erroneous.

Defendant also raises numerous claims of error in his standard 4 brief. Defendant first argues that he was denied the effective assistance of counsel. Defendant raises a redundant claim of error regarding trial counsel's failure to procure witnesses, including an expert witness. For the reasons discussed above, defendant has not overcome the presumption that his trial counsel's decisions regarding what witnesses to call constituted sound trial strategy. *Payne*, 285 Mich App

at 190. Defendant raises multiple other instances of counsel's alleged ineffectiveness,[2] but fails to adequately support his claims with citations to the record and supporting authority. As such, he has not met his burden of establishing ineffective assistance of counsel.

Defendant also argues in his Standard 4 brief that the trial court erred by failing to instruct the jury that the trial could end in a hung jury. However, the trial court's final jury instructions adequately apprised the jurors of their duty not to compromise their independent judgments for the sake of reaching a unanimous verdict. Moreover, defense counsel affirmatively stated that defendant had no objections to the trial court's jury instructions. "The Court of Appeals has consistently held that an affirmative statement that there are no objections to the jury instructions constitutes express approval of the instructions, thereby waiving review of any error on appeal." *People v Kowalski*, 489 Mich 488, 505 n 28; 803 NW2d 200 (2011).

Defendant raises other claims of error that are not included in the brief's statement of the questions presented and are not sufficiently supported in the brief. These claims are not properly before us and we need not consider them. *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009); *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007). At any rate, upon review, we are satisfied that none of defendant's arguments entitle him to relief.

Affirmed.

/s/ Patrick M. Meter
/s/ Peter D. O'Connell

[2] For instance, defendant asserts that trial counsel "was ineffective in failing to adequately investigate the viability of an insanity defense." However, the record before us does not support that an insanity defense might have been available to him. See *People v Carpenter*, 464 Mich 223, 226; 627 NW2d 276 (2001) (holding that a defendant does not establish the affirmative defense of insanity by merely establishing that he suffered from a mental illness). "Failing to advance a meritless argument . . . does not constitute ineffective assistance of counsel." *Ericksen*, 288 Mich App at 201.